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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-807

ROBERT C. AGRON,

Petitioner.

vs.

ILLINOIS BELL TELEPHONE COMPANY, ET AL.,

Respondents.

REPLY TO BRIEFS IN OPPOSITION OF ILLINOIS BELL TELEPHONE COMPANY AND UNITED STATES OF AMERICA.

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February 8, 1972.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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ARGUMENT.

This Reply answers the Briefs in Opposition of Illinois Bell Telephone Company ("IBT") and of the Government ("U. S.").[1]

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1. Respondents' filing of single Briefs in Opposition to the separate *Agron* and *Cleveland* petitions may have merit to the extent it conserves the time of this Court and the parties' expenses, but it is an imposition on this Court to suggest, as IBT does (Br. 2, n. 1), that the issues "are essentially similar." *Cleveland* involves a simple jurisdictional issue—whether a refund suit can be maintained without filing any refund claim—a question about which there is no conflict or doubt as to resolution.

1. Both IBT[2] and the Government suggest that this case involves only a controlling issue of state law, namely, whether the state and local taxes are imposed on IBT or subscribers (IBT 4-5, 7, 9; U. S. 7-8). But the paramount issue here is one of federal law: are the state and local taxes themselves "amounts paid for communication services" under IRC § 4251.[3] There is no basis for concluding, as IBT does (IBT 7) that what are communication services is to be determined by state law. That issue must be determined by federal law "so as to give a uniform application to a nationwide scheme of taxation." *Lyeth* v. *Hoey*, 305 U. S. 188 (1938). Respondents, as did the court below, stake their position on a state law issue which becomes totally irrelevant in the light of the federal statutes, regulations and rulings (set forth at Pet. 6-7, 10-12) which make clear that the state taxes, especially where separately stated, are not amounts paid for communication services.

For the same reasons, even if, *arguendo*, as a matter of state law the legal incidence of the state and local taxes on

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Respondents' lumping the cases together is a transparent effort to dilute the substantial issues presented in *Agron* which should be decided by this Court. A denial of certiorari in *Cleveland*, however, will not prejudice petitioners there since they are fully protected in the class represented by Agron.

2. Even though not a party to the decision on the merits (Count I), IBT argues the merits (IBT 2-10) as well as the procedural issues (IBT 10-16). This is but another instance of this public utility's working against the interests of its subscribers. IBT's claim (IBT 8, n. 4) that it must blindly follow the Government's dictates is not true. See IRC § 6415.

3. Nor did Agron "first contend," as the Court of Appeals said (Pet. 6a), that the local taxes are imposed directly on subscribers. It is respondents who have always contended that under state law the taxes are imposed on IBT and from that premise argued they are part of IBT's rates for telephone service. Petitioner has always asserted, *first*, that whether the legal incidence of the state and local taxes is on IBT or subscribers the taxes are not, as a matter of federal law, amounts paid for communication services, and second, under state law, the taxes are imposed on the subscribers and are not charges or rates for telephone service.

telephone service is on IBT rather than subscribers, it does not follow that such taxes are, as a matter of federal law, amounts paid for communication services. Respondents, as did the court below, erroneously assume that the determination of the legal incidence question under state law is the end of the matter. While it may be, in the context of various state law and constitutional principles, that the legal incidence falls on IBT, the federal courts need not blindly follow that law in determining whether such taxes are charges or amounts paid for communication services under the federal statutes, regulations and rulings set forth in the Petition. This is especially true where, as here, the Illinois Supreme Court has expressly held that the state taxes here involved are in substance imposed on the subscribers, not the utility. *East St. Louis* v. *Union Electric Co.*, 37 Ill. 2d 532, 229 N. E. 2d 522, *cert. denied*, 390 U. S. 948 (1967).

2. Even under state law, the state and local taxes are not charges or rates for telephone service.

(a) Contrary to respondents' assertions (IBT 6, 8, 9; U. S. 2, 7), the taxes separately billed to subscribers are not part of IBT's "expenses" for purposes of rate making. Only the first or original 3% of the State Message Tax (which is not billed to subscribers as a separate tax) is included by IBT and the Illinois Commerce Commission ("ICC") in determining "reasonable rates" for telephone services (Phelps' Affidavit ¶ 4, Jt. App. 44). (It is because this original portion of the State Message Tax is included in IBT's rates through the rate-making process that petitioner made no claim regarding such taxes. See Pet. 14a, n. 14.) Respondents' argument and the conclusion of the court below that the state and local taxes here involved are, like all other taxes and expenses, included by IBT and the ICC in determining fair telephone rates is simply not based in fact or law.

(b) Under § 35 of the Public Utility Act, Ill. Rev. Stat. (1971) ch. 111⅔, § 35, IBT is required to file rates for service *before* rendering service. Since IBT *may* but need not file schedules with respect to the state and local taxes under § 36(a) and (b), the § 36(a) and (b) taxes are not for telephone "service" within the meaning of § 10.15 of the Public Utility Act.

(c) There is no legislative history to support IBT's argument (IBT 6) that §§ 36(a) and (b) were enacted simply to provide for a speedy and economical substitute for rate-making. Rather, it is more likely that the intent was to permit the collection of taxes from the consumer, with the utility as the conduit, in order to meet state constitutional limitations as hinted at by the Court of Appeals (Pet. 9a, n. 11).

(d) The filing of supplemental schedules under §§ 36(a) (b) does not transform the taxes into rates for telephone service. The ICC is specifically denied rate-making power under §§ 36(a)(b) with respect to the state and local taxes, and is given the power only to determine whether the utility is collecting the correct amount of taxes plus the costs of collection.

3. To prop up the decision below IBT strongly relies on the 1969 tax ruling promulgated *pendente lite* and urges that it is not *ex post facto* because it merely "reaffirmed" an unpublished 1948 IRS letter ruling (IBT 2, 8, n. 4, 10, A7-A12).[4] The 1969 ruling is crucial to respondents' case because, contrary to IBT's assertion (IBT 8, n. 4), it was

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4. As noted, the court below also relied on the 1969 ruling *sub silencio* (Pet. 10, n. 3). Throughout its opinion the court speaks in terms of amounts "attributable" to taxes (Pet. 2a, 4a, 6a, 14a, 15a) just as does the 1969 ruling (IBT A11-A12). However, for many years the telephone bills upon which IBT has collected amounts for taxes as separate items state that such items are "due to," not "attributable" to taxes (Pet. 2a, n. 2).

the first time the Government took the position that the separate statement of taxes has no tax consequences to a vendee if *(arguendo)* the taxes are imposed on the vendor. On its face the 1948 ruling does not purport to deal with a situation where the taxes were stated separately (IBT A7-A9).[5] Significantly, the Government does not specifically cite or argue either ruling. Certainly this Court must be struck by the Government's glaring omission as to the 1969 ruling which purports to deal with the very state and federal taxes here involved. The Government offers no answer to the petitioner's contention (Pet. 8-12) that the separate statement of taxes does have different federal tax consequences which here requires the exclusion of the state and local taxes from the federal tax base.

In sum, respondents do not confront the contradiction between the decision below and the cases cited at Pet. 8-10, including one facet of this Court's holding in *Lash's Products*, that under federal law the price of goods or services does not include separately stated taxes whether the taxes are imposed on vendor or vendee. Likewise, respondents make no effort to deal with the federal statutes and the Government's own long-standing rulings (Pet. 10-12) which make clear that the separately stated local taxes—even if legally imposed on IBT—must be excluded from the federal tax base. These important issues remain in this case

5. Moreover, the 1948 ruling concerned certain taxes in the State of Washington the nature and imposition of which differed markedly from those of Illinois and, therefore, the 1948 ruling has no application here. See, *State ex rel. Pacific T. & T. Co.* v. *Department of Public Service*, 19 Wash. 2d 200, 142 P. 2d 498 (1943). It does not appear that the Washington passed-through taxes were stated separately on bills to subscribers or whether they were merely included in the general rates charged to subscribers. As to the invalidity of the 1948 ruling, we note that while the IRS concluded the local Washington taxes were includable on the ground that they "are considered proper items of operation expenses," the Washington Supreme Court held that the license taxes could be passed through to particular subscribers because they were *not* general operating expenses.

whether or not respondents face up to them. It is important that this Court resolve these issues and reverse the decision below so that millions of taxpayers—whose respect for the rule of law is so important to our system of voluntary tax payments—may be confirmed in their belief that neither Congress nor the courts have mandated a tax on a tax.[6]

4. With respect to the procedural issues, respondents suggest that judicial relief is unnecessary because there is an administrative body (IRS) that will "ensure repayment" (IBT 13; U. S. 12). But this "administrative" "remedy" will only ensure non-payment. The three million telephone subscribers can obtain refunds as a practical matter only by a class action (Pet. 13-15). Moreover, we stress that the relief sought here is that the United States make one refund to IBT in the total amount due to the class, an amount which can be readily and precisely determined by IBT, and that thereafter IBT make refunds to subscribers in a manner that will do substantial, if not precise, justice to them (Pet. 3-4, footnote*, and 17-18, n. 13). IBT is accustomed to making small refunds. Kalven and Rosenfield, "The Contemporary Function of the Class Suit", 8 U. of Chi. L. Rev. 684, 685-6, n. 5 (1941).

The cases cited by respondents (IBT 11; U. S. 12) are distinguishable. *Harkins* and *McConnell* concerned income tax refunds. In *Harkins* the court held it lacked jurisdiction

6. IBT suggests the issues may be moot after a 1973-1982 graduated tax repeal (IBT 7, n. 3). But repeal by 1982 obviously has no effect on the past; present and continuing refunds of 3,000,000 subscribers whose claims exceeded $10,000,000 as of 1969. Further, Congress passed (and later postponed) a similar repeal in 1965 (P. L. 89-44) because it expressly recognized the "regressive" character of the federal tax (1966 CCH Excise Tax Service, ¶ 2250, p. 1618). The fact that Congress would like to repeal this regressive tax someday hardly supports its past or continuing overcollection.

because the suit was untimely filed. In *McConnell* it does not appear that a class refund claim was filed or that there was such a substantial number of small claimants that it would be impractical to file individual claims. (Respondents do not cite *Lipsett* v. *United States*, 37 F. R. D. 549 (SDNY 1965), aff'd, 359 F. 2d 956 (CA 2, 1966), relied on by the district court (Pet. 24a), which implied that a class action would lie in a proper case.)

The Government also urges that a class refund does not satisfy the Treasury Regulations (U. S. 11). It does. The cases cited by the Government are fully answered by those cited at Pet. 17-18, n. 13 and *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71 (1933). The weakness of the Government's case may be measured by its argument that it will be denied an "audit to determine whether other taxes or debts are owing to the United States." An audit of what?—subscribers do not file excise tax returns. If the Government has the right and desire to consider millions of income tax returns of subscribers to offset taxes or indebtedness against small telephone tax refunds, there is no bar to its doing so, even though it anticipates audits no more than it does refund claims. See Pet. 15. In any event the lower court has not yet considered the mechanics of the refunds.

Nowhere do respondents meet the argument (Pet. 16-19) that the filing of the individual and class refund claims fully satisfy the jurisdictional requirements of IRC § 7422(a).

Conclusion.

Petitioner respectfully requests that this Court issue a Writ of Certiorari to the Court of Appeals for the Seventh Circuit, reverse the judgment of that court and grant such other relief as may be appropriate.

Respectfully submitted,

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